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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 420

BILL HATHALEY, WIDOW SLEEPY, CHARLIE BURKE, ET ALS., *Petitioners*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

NORMAN M. LITTELL,
1824-1826 Jefferson Place, N.W.,
Washington 6, D. C.,
Counsel for the Petitioners.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N.W.,
Washington 6, D. C.,

MILTON A. OMAN,
1122 Continental Bank Bldg.,
Salt Lake City 1, Utah,

DENNIS McCARTHY,
65 South Main Street,
Salt Lake City 11, Utah,

CHARLES J. ALEXANDER,
1824-1826 Jefferson Place, N.W.,
Washington 6, D. C.,
Of Counsel.

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OPINIONS BELOW

The oral opinion of the district court at the first trial (1R. 413-420)[1] is not reported. The opinion of the court below on the first appeal (1R. 428-438) is reported at 220 F. 2d 666. The opinion of this Court reversing the court below on the first appeal and remanding the cause for further findings is reported at 351 U.S. 173. The opinion of the court below on

[1] References to the record on the first appeal (No. 231, Oct. T. 1955) are given as "1R." References to the record on the second (and present) appeal are given as "2R." The record on the second appeal is physically contained in two volumes, but its pagination is consecutive.

the second appeal (Appendix A, *infra* pp. A1-A11) has not yet been reported. The district court's findings of fact and conclusions of law following the first trial appear at 1R. 18-48. The district court's findings of fact and conclusions of law following the present trial appear at 2R. 41-72.

JURISDICTION

The judgment of the court below (Appendix B, *infra* p. A12) was entered on July 11, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals was justified in directing the district judge to withdraw from the case on the basis of his attitude at the first trial, challenged here on the first appeal, and specifically held by this Court to be not improper.

2. Whether the district court properly excluded additional evidence as to the value of horses not shown to be similar to those owned by petitioners and destroyed by agents of the United States.

3. Whether the district court accurately approximated petitioners' consequential damages resulting from the destruction of their horses by agents of the United States.

4. Whether the district court properly awarded each injured petitioner the same sum for pain and suffering when the specific amount of property loss caused each one by the agents of the United States was not identical.

STATUTES AND RULES INVOLVED

1. 28 U.S.C. § 2674 provides, in pertinent part:

"§ 2674. Liability of the United States

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

2. Rule 52(a) of the Federal Rules of Civil Procedure provides, in pertinent part:

"Rule 52. Findings by the Court

"(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

STATEMENT

The case is here a second time. The essential facts are set forth, with due brevity, at 351 U.S. 173, 174-177. Those pertinent to the present issues may be summarized as follows:

A. The depredations involved

From time immemorial, petitioners and their families have lived in permanently constructed "hogans" upon an area of what is now public land of the United States in the southeastern corner of Utah. The Navajo Indians are herdsmen, and for many generations have continuously grazed horses and other livestock upon the land. (Fdgs. 1, 8, 17; 1R. 18, 24, 28.) In view of the limited resources of their country, the horse has become a vital part of these Indians' culture and economy, serving as beast of burden and as means of transportation, and, indeed, as a part of their religious life (Fdgs. 9-14; 1R. 24-27).

Following passage of the Taylor Grazing Act of June 28, 1934, now 43 U.S.C. §§315 *et seq.*, the area used by petitioners was incorporated within Utah Grazing District No. 6 (Fdg 3; 1R. 19-20). Permits to graze in that area were issued to white livestock operators (Fdg. 4; 1R. 20). Until 1946, the Navajos were not disturbed in their use of these lands for grazing purposes in common with non-Indians. However, after the employment of a new federal Range Manager in that year, Kinnaman by name, respondent's agents commenced a deliberate and increasingly intensive campaign of harassment and molestation to frighten the Navajos into surrendering possession of the area. Federal officers threatened the destruction of livestock and the imprisonment of individual Indians. They seized and chained the wives of four of the petitioners—one with an infant in arms. On another occasion, they threatened to take small children from a Navajo widow, to put her in jail, and to destroy her livestock unless she left the country. She left

immediately. (Fdgs. 17-20; 1R. 28-31; see also 1R. 163, 166-167, 170, 174, 301-302.)

In 1950, resorting to more regular procedure, the United States brought suit to compel the removal from the range of the livestock owned by the present petitioners. See *United States* v. *Hosteen Tse-Kesi*, 93 F. Supp. 745 (D. Utah). The district court's judgment of dismissal, on the ground that the proceeding would require the courts to perform duties vested by law in the Secretary of the Interior, was reversed (*United States* v. *Hosteen Tse-Kesi*, 191 F. 2d 518 (C.A. 10)), and the case was reinstated for trial on the merits. Subsequently, following the destruction of petitioners' horses—the subject-matter of the present action—the United States represented "that the defendants have returned to the Reservation and that there are no more trespassers," and the District Court on June 27, 1953, dismissed the proceedings as moot (Fdg. 18 at 1R. 29). At about the same time, local stockmen had instituted similar proceedings in the state courts. See *Young* v. *Felornia*, 121 Utah 646, 244 P. 2d 862, certiorari denied, 344 U.S. 886.

Kinnaman, the Interior Department's Range Manager, did not await the ultimate disposition of either of these lawsuits in the orderly course of judicial proceedings. With full knowledge that the question of petitioners' right to graze their livestock was still before the U. S. District Court (1R. 76-78), he initiated administrative steps, at his own instance (1R. 90) and without prior reference to the Advisory Board (1R. 93), looking to the destruction of the Indians' animals—and only the Indians' animals. The destruction of the horses and burros continued after the pres-

ent action was commenced and while the first trial was in progress (1R. 82, 84).

In view of this Court's holding (351 U.S. at 175-180) that the provisions of the Taylor Grazing Act were not complied with and that Utah abandoned horse statute, Utah Code Ann., 1953, Title 47, ch. 2, was in consequence not properly invoked, it is unnecessary to recite the facts dealing with the steps taken and not taken under those enactments.[2]

Beginning on September 20, 1952, and continuing until the present action under the Federal Tort Claims Act was instituted on March 20, 1953 (1R. 5), respondent's agents captured and completely destroyed the Indians' horses (Fdg. 19, 1R. 29; 1R. 42-43, 54).

The animals were rounded up on the range and were either driven or hauled in trucks to a Government owned or controlled corral 45 miles away. Horses which could not be so handled were shot and killed by the Government's agents on the spot. The remainder were accorded brutal treatment: the horses were so jammed together in the trucks that some died as a result, and, in one instance, the leg of a horse that inconveniently protruded through the truck body was sawed off by a federal employee, one Dee P. Black. (Fdgs. 23, 25; 1R. 33-35).[3] Later the animals were

[2] These facts are set forth at pp. 5-8 of petitioners' brief on the first appeal (Pet. Br., No. 231, Oct. T. 1955), hereinafter cited at "Pet. 1 Br."

[3] Much was sought to be made by the Government when the case was originally here (pp. 16-17, note 4, U.S. Br., No. 231, Oct. T. 1955; hereinafter cited as "U.S. 1 Br.") of the circumstances that the finding (1R. 35) was that the horse's leg was "sawed off" whereas the testimony (1R. 301) indicated that it was shot off. At the argument, on March 26-27, 1956 (J. Sup. Ct., Oct. T. 1955,

taken in trucks to Provo, Utah, a distance of 350 miles, where they were sold to a glue factory and horse meat plant for about $1,700—about 3¢ a pound—no part of which was received by petitioners (Fdg. 24, 1R. 34; 1R. 94, 294).

Respondent's agents were engaged in the wholesale slaughter of Indian livestock, without regard to existing property rights, as part of a preconceived plan to drive these Indians from their homes by destroying their means of livelihood (1R. 45, 47).

The district court specifically found that respondent's agents knew that the horses which they planned to and did kill belonged to petitioners (Fdgs. 28, 30; 1R. 36-37, 38). The Government agents' concern was not with the Indians' 153 horses and burros (Fdg. 31; 1R. 39) on an area where permits had been issued for the grazing of 3,899 cattle and 33,818 sheep owned by white men (1R. 410). It was the Indians that these federal agents sought to remove (1R. 45, 47).

Consequently, respondent's agents did not intend to permit the redemption of any Navajo horses and granted petitioners no opportunity for redemption (Fdg. 24, 1R. 34). On one occasion, when one of the petitioners located his horses and asked permission to reclaim them, federal agent Dee P. Black asked payment of $60 a head, a sum Black knew the Indians could not pay (Fdg. 26, 1R. 35; see

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pp. 187, 188), petitioners' counsel produced a certificate by the reporter which showed that, at 1R. 301, line 9, the third word was incorrectly transcribed as "shoot" and should have read "saw"; the rest of that line should accordingly have been transcribed as "and saw his foot off to get him out of the trucks."

The record of the hearing on remand shows that this same Dee P. Black is still an employee of the United States (2R. 309).

also 1R. 254, 261). In another instance, petitioner Hosteen Sakezzie and his family tracked their animals 35 miles to the Government corral, where Sakezzie requested Black to return his horses. During the conversation, one of the white stockmen left in his car and returned in a few minutes with several men armed with rifles, the loading mechanisms of which were worked before the Indians to convey to them the understanding that respondent's agents were prepared to shoot the Indians if they attempted to retake their horses. Sakezzie and his family became so frightened and intimidated by this threatening display of firearms that they departed peaceably and returned to their hogan without obtaining their horses. (Fdg. 27 at 1R. 36; see also 1R. 200-201, 212-214, 230-232.)

By contrast, five horses belonging to white men and unavoidably gathered with petitioners' horses were delivered by federal officers directly to the pastures or corrals of their owners, upon payment of a handling charge of only $2.50 per head (Fdg. 26, 1R. 35; see also 1R. 115-117).

B. First judgment; first reversal by the court below; its reversal in turn reversed by this Court. The district court held that the Taylor Grazing Act was applicable and that there had been no compliance with its requirements as to notice; that the Utah abandoned horse statute, even if applicable, had not been followed; and that the horses in any event were not abandoned (1R. 41-45, 413-417).

In considering the amount of damages to be awarded, the district court took into consideration the unique position of the horse in the Navajo culture and economy, and the unique value to the petitioners of the

animals that the Government agents had slaughtered (Fdgs. 8-16, 29; 1R. 24-28, 37-38; see further *infra*, p. 10). For the destruction of that property, and for the consequential damage to which petitioners were subjected (Fdgs. 1-3, 1R. 39-41), the district court entered a single judgment for all petitioners for $100,000 (1R. 49-50). *Sua sponte* (see 1R. 417-418), the district court also enjoined the United States and its agents from further molesting petitioners pending further action by the court (1R. 48-49).

On appeal, the court below reversed, and directed dissolution of the injunction and entry of judgment for the United States, essentially on the applicability of and asserted compliance with the Utah statute (1R. 428-438; 220 F. 2d 666).

This Court granted certiorari (350 U.S. 817). On the merits (351 U.S. 173), it held that the provisions of the Taylor Grazing Act were applicable but not followed, so that the Utah statute could not be invoked, with the result that the United States was liable under the Tort Claims Act for the damages caused petitioners by its agents. The Court specifically upheld the trial judge's findings despite the Government's attack on his fairness (351 U.S. at 177, note 3). The judgment of the court below dissolving the injunction was affirmed, but in all other respects it was reversed, and the cause was remanded to the district court to make adequate and appropriate findings to permit proper apportionment of the award (351 U.S. at 182).

The present petition is concerned with the proceedings taken pursuant to the remand.

C. Value and unique character of petitioners' animals. At the original hearing, the district court made findings, accepted here (351 U.S. at 177), concerning the unique position of the horse in the Navajo culture and economy (Fdgs. 8-16, 29; 1R. 24-28, 37-38). The district court specifically found: The Navajo's horse is part of his way of life, specially trained and bred over many generations, essential to his spiritual and material well-being. Peculiarly adapted to the desolate country in which petitioners live, these horses can carry heavy burdens for up to three days without food or water. (Fdg. 15, 1R. 27.) They are used to till the dry land crops; they haul water, wood and supplies for great distances; they transport petitioners' families, the aged, and the sick (Fdg. 10, 1R. 25). Understanding only Navajo commands, the horse is the prized possession of the Navajo (Fdg. 15, 1R. 27). A horse is an inseparable part of Navajo family and religious life, the best horse being selected to ride with his dead master into the after world (Fdg. 14, 1R. 26-27). Navajo horses are never sold to white men, and while the reasonable market value of a white man's horse of average quality was $300, the replacement cost to petitioners of a horse they might obtain through transactions with white men was $1,000 (Fdg. 1, 1R. 39). The evidence on which those findings are based is set forth at 1R. 284-286, 290, 325-330.

Similar findings were made on the remand (Fdgs. 1-4, 2R. 42-43), in consequence of which "the Court finds an average fair valuation per horse or burro taken of $395.00 per head" (Fdg. 4, 2R. 43). There was a finding, based on a stipulation, of the number of horses and burros taken from each petitioner (Fdg. 6, 2R. 44).

At the remand, the district court stated, with the apparent acquiescence of Government counsel, that (2R. 75) "we are not going to reopen any question about the value of the horses." The Government thereafter was not permitted to ask questions as to the availability of other horses for replacement (2R. 162, 167-168, 202, 330-335, 369-375, 396-397, 399, 409-411, 445, 447, 455-457). There was no attempt to show, however, that these horses were similar to petitioners' horses, except insofar as the Government's proffer of certain pictures of horses (Def. Ex. A-H, 2R. 445, 447; offered at 2R. 330-335) can be construed as an effort to show that the animals represented in those photographs had all the characteristics (Fdgs. 15-16, 1R. 27-28) of such of petitioners' horses as the Government agents had killed.

Numerous petitioners testified that they had no means to obtain any replacement for their animals (2R. 78, 115, 121, 158, 167, 200, 231, 244, 275), and that in any event they did not undertake to obtain replacements for fear that the Government agents would take and destroy the new animals just as they had previously taken and destroyed the old (2R. 89, 155, 173, 239, 252, 266, 268).

There was evidence that the Indians on occasion ate their horses (e.g., 2R. 122, 160-161, 168, 194), apparently because (2R. 202), "We were told from our ancestors that if there is any epidemic the type of food that would counteract that sickness would be horse meat, so they use it as a medicine to counteract those epidemics if it should befall the people," this because of the special and important place that the horse occupies in the life of the Navajo Indian (*id.*).

D. Evidence as to petitioners' consequential losses. As at the original hearing (Fdg. 13, 1R. 26; quoted, 351 U.S. at 175, note 1), the district court made findings as to the importance of the horses to petitioners' economy and way of life (Fdgs. 29-40, 2R. 52-57). In the words of Hosteen Sakezzie (2R. 77), "they have taken our working tool away from us"; horses are (2R. 93) "our mainstay to operate livestock." Bill Hatahley testified (2R. 134), "If you were to be a successful operator in a livestock operation, a horse would be your mainstay to take care of these other classes of animals;" and, on cross-examination (2R. 154), "the only tool that they know how to use is the horses." Eddie Nocki said (2R. 283), "A horse to an Indian mind is the boss of all operation", and explained (2R. 285) that the loss of his horses resulted in the reduction of his stock of sheep and goats "because the very thing that I use to operate my livestock has been taken away." Slim Todachennie testified regarding the loss of his horses (2R. 270), "It is just like cutting your both leg off and cut your both arms off, and it is just like taking one of your eyes out. That is the way it affects our life."

Accordingly, after making the specific findings mentioned above, the district court found (Fdg. 33, 2R. 54):

> "* * * Taking into consideration other factors which may have contributed to the reduction in size of the plaintiffs' herds, the Court finds that a fair measure of the consequential damages resulting from such deprivation of use would be approximately fifty percent of the difference between the dollar value of the plaintiffs' herds of sheep, goats, and cattle at the time the horses were

taken, and the dollar value of the same herds at the time of the Court's hearing in October and November, 1956. Since the economic status of the Navajo is dependent largely upon the number of their livestock, the Court finds that fifty percent of the dollar value reduction of their herds since the horses were taken is a reasonable measurement of the extent of the deprivation of use of the horses upon the lives and economy of the plaintiffs."

Thereafter, the district court made findings as to "the average overall market price of sheep [and goats] such as owned by the plaintiffs" (Fdg. 39, 2R. 57); and as to the reduction in each petitioner's stock of sheep and goats subsequent to the taking and destruction of their horses, and awarded to each petitioner one half of the reduced value of their stock based on the loss suffered by each (Fdgs. 41-70, 2R. 57-71).

Despite findings as to the loss suffered by petitioners in cultivating their gardens without horses (Fdg. 34, 2R. 54-55), in being unable to hunt deer because of the deprivation of their horses (Fdg. 35, 2R 55), and in being unable to gather pinon nuts and firewood for the same reason (Fdgs. 36-37, 2R. 55-56), the court awarded no consequential damages other than those arising from the reduction in their herds of sheep and goats.

E. Evidence as to petitioners' mental pain and suffering. The findings made by the district court as to the facts giving rise to petitioners' mental pain and suffering (Fdgs. 7-28, 2R. 44-52) for the most part duplicated findings previously made (Fdgs. 8-20, 23-28, 31, 3; 1R. 24-31, 33-37, 39, 40-41) and accepted here (351 U.S. at 176-177). The district court then

awarded $3,500 to each petitioner for mental pain and suffering for the reason stated in his Finding 28 (*infra*, p. A9):

> "28. It is not possible for the extent of the mental pain and suffering to be separately evaluated as to each individual plaintiff. It is evident that each and all of the plaintiffs sustained mental pain and suffering. Nor is it possible to say that the plaintiffs who lost one or two horses sustained less mental pain and suffering than plaintiffs who lost a dozen horses. The mental pain and suffering sustained was a thing common to all the plaintiffs. It was a community loss and a community sorrow shared by all. On this basis, the Court finds and awards the sum of $3,500.00 to each of the plaintiffs as a fair and reasonable approximation of the mental pain and suffering sustained by each, as a proximate result of the taking of the horses by the defendant."[4]

F. Second judgment in the district court; second reversal by the court below. Based on the foregoing findings, the district court entered judgment in favor of each petitioner (2R. 72-73), the amount in each instance being based on (Fdgs. 41-70, 2R. 57-71) the value of the horses and burros taken from each as direct damages, one-half of the value of the reduction in livestock suffered by each by way of consequential damages resulting from loss of their horses, and $3,500 to each for mental pain and suffering. The aggregate of the judgments in favor of all the petitioners was $186,017.50 (2R. 73).

Again the United States appealed, and again the court below reversed the judgment in petitioners'

[4] We have quoted the finding as it appears in the opinion below. The version at 2R. 52 omits a line and is therefore garbled.

favor, this time for a new trial as to damages only (*infra*, p. A12) but with directions (*infra*, p. A11) "that further proceedings be had before another Judge."

Reversal was rested on the district court's alleged failure to consider replacement cost; on its allegedly erroneous and speculative measure for consequential damages; and on its allegedly conjectural award of pain and suffering. Then, relying on what it conceived to be the trial judge's partial conduct, the court below directed that he should withdraw from further proceedings. As will be shown below in the course of the argument (*infra*, pp. 16-17), every instance of alleged impropriety mentioned in the opinion took place at the original hearing, and was sustained by this Court as not improper in the face of attack by the Government here.

REASONS FOR GRANTING THE WRIT

Once again Hatahiey *et al.*, a small group of Navajo Indians shown to have been grievously despoiled in particularly brutal fashion by the agents of their guardian, the United States, come to this Court seeking the justice that has been denied them by the court of appeals. Once again these Indians petition this Court to review a decision of the Tenth Circuit setting aside an award in their favor. Once again the opinion below reflects a disinclination to give ungrudging or even adequate consideration to the Indians' claims. But whereas on the first appeal that disinclination was reflected in a flat denial of liability, on the present occasion it involves a disregard of the governing law of damages, and, far more serious, an overruling of

this Court on a point squarely decided here the first time.

First. When the case was here before (No. 231, Oct. T. 1955), the Government's initial point (U.S. 1Br. 14-20) was that "The Court of Appeals correctly regarded the finding and decision of the District Court as being influenced by an unwarranted attitude of hostility to the Government's case."

This Court squarely rejected the Government's challenge. It said (351 U.S. at 177, note 3):

> "While the Government does not challenge particular findings, it does level a general charge that the trial was conducted in such an atmosphere of bias and prejudice that no factual conclusions of the court should be relied on. The Court of Appeals noted 'that the case was tried in an atmosphere of maximum emotion and a minimum of judicial impartiality.' 220 F. 2d at 670. After oral argument and a thorough consideration of the record, however, we do not find that the trial was conducted so improperly as to vitiate these findings. See *Labor Board* v. *Donnelly Co.*, 330 U.S. 219, 236-237."

Following the second hearing, the court of appeals directed the district judge to disqualify himself, saying (*infra*, pp. A10-A11),

> "A casual reading of the two records leaves no room for doubt that the District Judge was incensed and embittered, perhaps understandably so, by the general treatment over a period of years of the plaintiffs and other Indians in southeastern Utah by the government agents and white ranchers in their attempt to force the Indians on to established reservations. This was climaxed by the range clearance program, with instances of brutal

handling and slaughter of their livestock, which the Court, during trial, referred to as 'horrible' [1R. 223], 'monstrous' [1R. 223, 226], 'atrocious' [1R. 326], 'cruel' [1R. 222], 'coldblooded depredation' [1R. 226], and 'without a sense of decency' [1R. 222]. The Court firmly believed that the Indians were being wrongfully driven from their ancestral homes, and suggested Presidential [1R. 223, 418] and Congressional [1R. 225-226] investigations to determine their aboriginal rights. He threatened to conduct such an investigation himself [1R. 83-85, 276-277, 418]. A public appeal on behalf of the plaintiffs was made for funds and supplies to be cleared through the Judge's chambers [1R. 224, 246-247, 277-278, 281].[6] From his obvious interest in the case, illustrated by conduct and statements made throughout the trial, which need not be detailed further, we are certain that the feeling of the presiding Judge is such that, upon retrial, he cannot give the calm, impartial consideration which is necessary for a fair disposition of this unfortunate matter, and he should step aside."

[6] [Footnote in original] The allowance of $395.00 per head for the Indian horses and burros, and $3,500.00 for mental pain and suffering for their loss, is of itself an indication of the desire of the presiding Judge to assist the plaintiffs for the different wrongs which they had suffered.

Each of the bracketed citations is to the record of the first hearing, which has already been before this Court. It is significant that the court of appeals referred to no single instance from the second record, indeed to no single word from that source, to justify its removal of a judge whose conduct had been specifically approved by this Court as not improper.

We are aware that on the present occasion the court below sat en banc. But not even a court of appeals en

banc has the power to overrule this Court on a point which this Court has specifically resolved at an earlier stage of the same litigation. We therefore submit that the court below acted in excess of its authority in directing the district judge to step aside on the basis of the matters set forth in its opinion. We further submit that a court of appeals lacks power to eliminate a district judge from a case simply because it disagrees with him, the more so where his views on the first disagreement and not theirs have received the approval of this Court. If, as the court of appeals appeared to indicate (note 6 of its opinion, quoted *supra*, p. 17), the district judge's award of heavy damages for the present depredation reflects such partiality as to disqualify him from further participation in the case, then by parity of reasoning the judges of the court below who on the first appeal held the United States not even liable for its authorized agents' spoliation of these Indians would seem to be similarly disqualified.[5]

We believe that the action of the court below in directing the district judge to withdraw constitutes just such a departure from the accepted and usual course of judicial proceedings as requires review here. And even if the matter were less clear than we think it is, the question of whether and when a trial judge may properly be called on to withdraw is bound to be a recurring one, and so needs clarification by this Court, particularly since the authorities here relied on by the court of appeals (*infra*, p. A11)—*Cooke* v. *United*

[5] Compare *A. B. Dick Co.* v. *Marr*, 197 F. 2d 498, certiorari denied, 344 U.S. 878, a Second Circuit case heard by circuit judges from the First, Fourth and Fifth Circuits specially assigned by the Chief Justice.

States, 267 U.S. 517; *Offutt* v. *United States*, 348 U.S. 11; *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 259—are so obviously inapposite to the situation presented by the present case. Such clarification would not only be appropriate, if is necessary lest other litigants with equally worthy causes be subjected to the judicial crossfire which up to now has thwarted these petitioners' quest for redress.[6]

Second. On the merits of the cause, the court below plainly disregarded the guideline for cases of this character: "'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights. *Story Parchment Co.* v. *Paterson Co.*, *supra*, [282 U.S. 555], 565." *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, 265-266. *Accord: Gould* v. *Mountain States Telephone & Telegraph Co.*, 6 Utah 2d 187, 193, 309 P. 2d 802, 805-806. And, as we shall show the court below disregarded the Utah law, which, under 28 U.S.C. § 2674 (*supra* p. 3), supplies the governing standard, in other respects as well.

1. It is the law of Utah that a verdict for damages will not be set aside as excessive so long as there is any evidence to support such damages (e.g., *Braegger* v. *Oregon Short Line R.R. Co.*, 24 Utah 391, 397, 68 Pac. 140, 141; *Palmquist* v. *Mine & Smelter Sup. Co.*,

[6] We cannot forbear to remark that while the Government has twice sought to remove the district judge, each time after he gave judgment for petitioners, it still continues in its employ Dee J. Black (2R. 309), who sawed or shot off, see note 3 at pp. 6-7 *supra*, the leg of one of their horses, and who was a major actor in the present depredations (Fdg. 19 at 1R. 30; Fdgs. 25-28, 1R. 34-37; Fdgs. 11, 13-17, 2R. 46, 47-48).

25 Utah 257; 260, 70 Pac. 994, 995), just so long as the award is not such as to shock the reviewing court's conscience (*Pauly* v. *McCarthy*, 109 Utah 431, 184 P. 2d 123). Here the district court's award of $395 per horse was amply supported by evidence (1R. 284-286, 290, 325-330) and was moreover well below the figure of $1,000 originally found as such value (Fdg. 1, 1R. 39).

The additional evidence as to value proffered by the Government (*supra*, p. 11) was properly rejected. In the first place, there was no attempt whatever to show that any of the other horses allegedly available had the attributes of petitioners' destroyed animals, qualities that were set forth with specificity in detailed findings (Fdgs. 15-16, 29; 1R. 27-28, 37-38) that this Court accepted (351 U.S. at 175, 177). See also Fdgs. 3-4, 21, 24-26; 2R. 42-43, 49-50, 50-51. When a tort-feasor destroys property of greater value than the average of its kind, he is liable in heavier damages, just as he is when he injures a person with an earning capacity higher than that of the average workman. See *Clawson* v. *Walgreen Drug Co.*, 108 Utah, 577, 162 P. 2d 759. Secondly, all such evidence was cumulative, inasmuch as considerable evidence as to the value of the horses had already been received at the first hearing (1R. 144, 333, 334, 378, 381, 297; see also other references collected at U.S. 1 Br. 58).[7]

We are prepared to accept the standard of the court of appeals (*infra*, p. A5) that "the plaintiffs

[7] The court below was plainly in error in stating (*infra*, p. A5) that "The court rejected evidence of the availability of like animals in the immediate vicinity, and their value." As is shown in the text, there was no indication that the other animals were in fact alike, and in any event evidence of their value was in the record.

were entitled to the market value, or replacement cost, of their horses and burros as of the time of taking, plus the use value of the animals during the interim between the taking and the time they, acting prudently, could have replaced the animals." But the fact was that petitioners feared that any new horses would be destroyed by the Government's agents as the old ones had been (2R. 89, 115-116, 173, 239, 252, 266, 268), and that many petitioners had no means to get replacements (2R. 78, 115, 121, 158, 167, 200, 231, 244, 275). Inasmuch as the original taking occurred between September 1952 and March 1953 (*supra*, p. 6) while the court below in March 1955 (1R. 428-438) declared that the agents acted properly in taking and destroying petitioners' horses, a holding that was not reversed here until May 1956, so that any new horses acquired up to that time were subject to similar treatment, it is hardly fair (opinion, *infra* p. A8) to charge petitioners with lack of prudence in not immediately buying replacements. No reasonably prudent Indian would have invested a penny in horses or burros in those circumstances, even if he had been in funds. Here petitioners had no means to make purchases, and their credit was shown to have been substantially diminished by the original taking (2R. 33, 90, 142, 180, 211, 259-260, 273, 279-280, 286).[8]

2. The district court's findings as to the elements of consequential damages suffered by petitioner in conse-

[8] The court below was similarly wrong in saying (*infra*, p. A5), "The plaintiffs did not prove the replacement cost of the animals, but relied upon at theory that the animals taken were unique because of their peculiar nature and training, and could not be replaced." Finding 1, 1R. 39, and Finding 1, 2R. 43, are specifically directed to replacement cost:

quence of the loss of use of their horses and burros (Fdgs. 29-38, 2R. 52-57) represent a fair approximation of elements not susceptible of proof to a mathematical certainty in compliance with the rule of *Bigelow RKO Radio Pictures*, 327 U.S. 251, *supra*. See pp. 12-13, *supra*, where the trial judge's views are more fully set forth. We submit that there is no basis for the court of appeals' conclusion (*infra*, p. A6), "If the unlawful taking of the animals was the proximate cause of the herd reductions, the measure of damages would be the loss of profits occasioned thereby." That statement confuses the direct damages from loss of use of the horses with the consequential damages of such loss of use, namely, the reduction in the number of sheep and goats, a loss of capital assets. Damages for the loss or destruction of such an asset is its reasonable value at the time of such loss or destruction. *Marks* v. *Culmer*, 6 Utah 419, 24 Pac. 528; *Sharp* v. *Gianulakis*, 63 Utah 249, 225 Pac. 337; *Angerman Co. Inc.* v. *Edgemon*, 76 Utah 394, 290 Pac. 169.[9] Moreover, in view of the undisputed testimony that it was the loss of petitioners' horses that was responsible for the reduction in their herds (2R. 78-79, 100, 117, 136, 157, 165, 178, 207, 227, 240, 245-246, 250, 263, 270-271, 276-277, 284), the district court's award of half the value of the reduction as consequential damages (Fdg. 33, 2R. 54; quoted *supra*, pp. 12-13) was indeed modest. Accordingly the case of *United States* v. *Huff*, 173 F. 2d 678 (C.A. 5), relied on by the court below (*infra*, p. A7), is clearly distinguishable.

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[9] In support of its rulings, the court below cited (*infra*, p. A6) "25 C.J.S., Damages, Sections 42 and 44." A more apposite citation would have been *id.*, Section 83a.

3. Nor is there any basis in the record for the court of appeals' statement (*infra*, p. A9) that "Apparently the court found a total amount which should be awarded to all plaintiffs for pain and suffering and divided it equally among them," an assertion that is moreover specifically negatived by Finding 28 set forth in footnote 5 of the court of appeals opinion (*infra*, p. A9).[10] Of course "Pain and suffering is a personal and individual matter" (opinion, p. A9, *infra*), but when a person suffers a severe loss in harrowing circumstances, his mental pain is not to be measured by the monetary amount of his property loss. As the district judge said, "Nor is it possible to say that the plaintiffs who lost one or two horses sustained less mental pain and suffering than plaintiffs who lost a dozen horses" (*infra* p. A9, note 5). If one man lives in a castle, while another lives in a cottage, and both dwellings are tortiously destroyed, the monetary damage is different but the mental pain and suffering caused by loss of one's home may well be the same.

The Utah law is that pain and suffering, where it is a necessary and natural result of the defendant's acts, is compensable (*Palmquist* v. *Mine & Smelter Sup. Co.*, 25 Utah 257, 70 Pac. 994; *Webb* v. *Snow*, 102 Utah 435, 132 P. 2d 114); that where the defendant's acts have been wanton and willful—as indeed they were in this case—damages for fright can also be recovered (*Jeppsen* v. *Jensen*, 47 Utah 536, 155 Pac. 429); and that a fair approximation by the trier of facts suffices. See *Duffy* v. *Union Pac. R. Co.*, 118 Utah 82, 91, 218 P. 2d 1080, 1082: "Both the court and jury are required to deal with many unknown

[10] Compare note 4, *supra*, p. 14.

factors and a good guess is about the best that can be hoped for. The permissible minimum and maximum limits within which a jury may operate for a given injury are presently far apart and must continue to be widespread so long as pain and suffering must be measured by money standards." Plainly, therefore, the trial judge here correctly applied the governing Utah law.

4. In remanding the case, this Court said (351 U.S. at 182):

> "* * * Here the District Court merely awarded the amount prayed for in the complaint. There was no attempt to allot any particular sum to any of the 30 plaintiffs, who owned varying numbers of horses and burros. There can be no apportionment of the award among the petitioners unless it be assumed that the horses were valued equally, the burros equally, and some assumption is made as to the consequential damages and pain and suffering of each petitioner. These assumptions cannot be made in the absence of pertinent findings, and the findings here are totally inadequate for review. **The case must be remanded to the District Court for the appropriate findings in this regard.**"

The district court's present findings (2R. 42-71) comply fully with this Court's mandate. As we have shown, the award made was in conformity with Utah law, and, since the district judge is from the Utah bar, his views of that law are entitled to special weight. See *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 204-205. Moreover his approach is consistent with the principles laid down in *Bigelow* v. *RKO Radio Pictures*, 327 U.S. 251, as to the need for awarding damages for admitted wrongs regardless of difficulty in ascertaining them, and his findings are supported by

evidence. The norm of judicial administration embodied in Rule 52(b), F. R. Civ. P. (*supra* p. 3) accordingly requires that those findings be upheld. *Per contra,* the court of appeals' approach disregards the Utah law, disregards the *Bigelow* case, misapplies the measure for loss of a capital asset, and is tainted throughout with an attitude towards petitioners that reflects all too faithfully its earlier holding that they were entitled to nothing.

CONCLUSION

It is time to end this belated chapter in the deplorable history of the Government's treatment of its Indian wards, and to give substance to these petitioners' claims. The present petition for certiorari should therefore be granted.

Respectfully submitted.

NORMAN M. LITTELL,
1824-1826 Jefferson Place, N.W.,
Washington 6, D. C.,
Counsel for the Petitioners.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N.W.,
Washington 6, D. C.,

MILTON A. OMAN,
1122 Continental Bank Bldg.,
Salt Lake City 1, Utah,

DENNIS MCCARTHY,
65 South Main Street,
Salt Lake City 11, Utah,

CHARLES J. ALEXANDER,
1824-1826 Jefferson Place, N.W.,
Washington 6, D. C.,

Of Counsel.

OCTOBER 1958.

APPENDIX A

OPINION BELOW

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 5717 — May Term, 1958

UNITED STATES OF AMERICA,
Appellant,

vs.

BILL HATAHLEY, WIDOW SLEEPY, CHARLIE BURKE, LUCY HARVEY, SHORTY SMILES, NOTONA BEGAY, MARK TOOTSONIAN, MARY JAY, JOHN JAY, FRANK JOE, DANNY JONES, JIM ANTEZ, CYRUS BEGAY, ALLEN BEN, WILLIE HARVEY, TOM JONES, HOSTEEN SAKEZZIE, FRED JOHNSON, JIM HATAHLEY, BILLIE ANTEZ, LITTLE WAGON, TOM MUSTASH, SLIM TADACHENNIE, MARY'S BOY, EDDIE NOCKI, SUSIE SLEEPY, MRS. LILLY THOMAS, JIM HARVEY, TOM'S FATHER, and TOM BELATSO,
Appellees.

Appeal from the United States District Court for the District of Utah, Central Division.

(July 11, 1958)

Harold S. Harrison, Attorney, Department of Justice, Washington, D.C., (Perry W. Morton, Assistant Attorney General, Washington, D.C., A. Pratt Kesler, United States Attorney, Salt Lake City, Utah, Llewellyn O. Thomas, Assistant United States Attorney, Salt Lake City, Utah, and Roger P. Marquis, Attorney, Department of Justice, Washington, D.C., were with him on the brief), for Appellant.

Dennis McCarthy, Salt Lake City, Utah, (Milton A. Oman, Salt Lake City, Utah, was with him on the brief), for Appellees.

Before BRATTON, Chief Judge, and MURRAH, PICKETT, LEWIS, and BREITENSTEIN, Circuit Judges.

PICKETT, Circuit Judge.

This case is before us for the second time. It was brought by the plaintiffs, who are Indians of the Navajo tribe, under the provisions of the Federal Tort Claims Act, (28 U.S.C.A., §§ 1346(b) and 2671, et seq.), to recover $100,000.00 as damages for the loss of horses and burros, which they allege were wrongfully and unlawfully seized and destroyed in the State of Utah by agents of the United States Bureau of Land Management. The trial court found for the plaintiffs and entered a lump sum judgment of $100,000.00. We reversed on the grounds that the horses and burros in question had been lawfully seized and disposed of under the Utah "abandoned horse" statute, Utah Code Ann. 1953, Title 47, Chapter 2. We did not consider the question of liability under the Federal Tort Claims Act, or the sufficiency of the findings as to damages. United States v. Hatahley, 220 F.2d 666. The United States Supreme Court reversed, and held that the provisions of the Federal Range Code must be complied with before local procedures may be resorted to for the removal of trespassing livestock from the public range. It was also held that the acts of the government agents "were wrongful trespasses not involving discretion", which gave rise to a

claim compensable under the Federal Tort Claims Act. The case was remanded for specific findings as to damages. Hatahley v. United States, 351 U.S. 173.[1] The factual background is set forth in our former opinion and that of the Supreme Court, and need not be repeated here.

Upon remand, the District Court took additional evidence on the issue of consequential damages, and without an amendment of the complaint, entered a judgment against the United States for the total sum of $186,017.50. The value of each horse or burro taken was fixed at $395.00; each plaintiff was awarded $3,500.00 for mental pain and suffering; and damages were given for one-half of the value of the diminution of the individual herds of sheep, goats and cattle between the date the horses and burros were taken in 1952, and the date of the last hearing in 1957. Except as to those relating to specific damages for each

[1] In referring to damages, the Supreme Court said: "The District Court awarded damages in the lump sum of $100,000, the amount sought by petitioners jointly. Apparently this award was based on the value of the horses, consequential damages for deprivation for use and for 'mental pain and suffering'. Under the Federal Tort Claims Act, damages are determined by the law of the State where the tortious act was committed, 28 U.S.C. § 1346(b), subject to the limitations that the United States shall not be liable for 'interest prior to judgment or for punitive damages', 28 U.S.C. § 2674. But it is necessary in any case that the findings of damages be made with sufficient particularity so that they may be reviewed. Here the District Court merely awarded the amount prayed for in the complaint. There was no attempt to allot any particular sum to any of the 30 plaintiffs who owned varying numbers of horses and burros. There can be no apportionment of the award among the petitioners unless it be assumed that the horses were valued equally, the burros equally, and some assumption is made as to the consequential damages and pain and suffering of each petitioner. These assumptions cannot be made in the absence of pertinent findings, and the findings here are totally inadequate for review. The case must be remanded to the District Court for the appropriate findings in this regard." (351 U.S. 182)

plaintiff, the findings of fact are generally a resumé of the evidence favorable to the plaintiffs, and inferences which the court thought could be reasonably drawn therefrom. The United States contends that there were numerous errors in rejecting evidence, limiting cross-examination, and in disregarding fundamental principles of law. It vigorously insists that there has not been a fair and impartial trial as to damages, and that one cannot be obtained except before another Judge.

The parties stipulated as to the number of horses and burros which were taken from each plaintiff in the range clearance program. The damage for this wrongful taking is to be determined by the law of Utah. In Egelhoff v. Ogden City, 71 Utah 511, 267 Pac. 1011, 1016, the Supreme Court of Utah, in discussing the rule as to damages in a case of this kind, said:

> "* * * Appellant contends that the measure of damages in this case is the difference between the market value of the property immediately before and immediately after the injury. It may be conceded that such is the proper measure of damages. It has been held by this court that the measure of damages for the destruction of a house is the 'cost to reproduce it, and the value of its use while that was being done.' Marks v. Culmer et al., 6 Utah, 419, 24 P. 528."[2]

Cf. Angerman Co., Inc., v. Edgermon, 76 Utah 394, 209 Pac. 169, 79 A.L.R. 40. (Personal property not entirely destroyed). In a recent case the Utah court applied the replacement rule where personal property (poultry) was destroyed. Park v. Moorman Mfg. Co., 121 Utah 339, 241

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[2] As a general rule, market value is the highest price a purchaser is willing to pay for property, not being under compulsion to buy, and the lowest price a seller is willing to accept, not being under compulsion to sell. Words and Phrases, "Market Value", Vol. 26A, p. 66; Northern Oil Co. v. Industrial Commission, 104 Utah 353, 140 P.2d 329; A. & A. Tool & Supply Co. v. Commr. of Internal Revenue, 10 Cir., 182 F.2d 300.

P.2d 914, 40 A.L.R.2d 273. See also Haycraft v. Adams, 82 Utah 347, 24 P.2d 1110; Bergstrom v. Mellen, 57 Utah 42, 192 Pac. 679; Metcalf v. Mellen, 57 Utah 44, 192 Pac. 676. Cf. Egelhoff v. Ogden City, supra.

The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party. Hill v. Varner, 4 Utah 2d 166, 290 P.2d 448; Park v. Moorman Mfg. Co., supra.[3] Applying this rule, the plaintiffs were entitled to the market value, or replacement cost, of their horses and burros as of the time of taking, plus the use-value of the animals during the interim between the taking and the time they, acting prudently, could have replaced the animals.

The plaintiffs did not prove the replacement cost of the animals, but relied upon a theory that the animals taken were unique because of their peculiar nature and training, and could not be replaced. The trial court accepted this theory, and relying upon some testimony that a horse or a burro could be traded among Indians for sheep, goats or cattle worth a stated price, together with the owner's testimony of value, arrived at a market price of $395.00 per head. No consideration was given to replacement cost. The court rejected evidence of the availability of like animals in the immediate vicinity, and their value. This, we think, was error. It is true that animals of a particular strain and trained for a special purpose are different from animals of another strain and not so trained, but that does not mean that they cannot be replaced by animals similarly developed and trained, or which may be trained after acquisition. Ordinarily every domestic animal is developed

[3] Restatement of the law of Torts, Section 912, states the rule as follows: "A person to whom another has tortiously caused harm is entitled to compensatory damages therefor if, but only if, he established by proof the extent of such harm and the amount of money representing adequate compensation with such certainty as the nature of the tort and the circumstances permit."

and trained for the purpose to which the owner intends to use it. This development and training adds to its usefulness and generally increases the market value of the animal. In arriving at a fair market value of destroyed animals, the court should consider evidence of the availability of like animals, together with all other elements which go to make up market value. In proper instances, parties and witnesses may be cross-examined on the subject.

Likewise, we think the court applied an erroneous rule, wholly unsupported by the evidence, in arriving at the amount of loss of use damage. There was testimony by the plaintiffs that because of the loss of their horses and burros they were not able to maintain and look after as much livestock as they had been able to before the unlawful taking, consequently the size of their herds was reduced. If the unlawful taking of the animals was the proximate cause of the herd reductions, the measure of damages would be the loss of profits occasioned thereby. 25 C.J.S., Damages, Sections 42 and 44.

Applying the same formula to all plaintiffs, the court, without giving consideration to the condition, age or sex of the animals, found the value of the sheep and goats in 1952 to be $15.00 per head, and cattle to be $150.00 per head. The number of sheep, goats and cattle which each plaintiff had in 1952, as well as the number which each had at the date of the last hearing was established. This difference was multiplied by $15.00, in the case of sheep and goats, and by $150.00, in the case of cattle, and judgment was entered for one-half of the amount of the result. No consideration was given to the disposition of the livestock by the plaintiffs in reducing the herds. For example, the plaintiff Sakezzie had 600 sheep and goats and 101 head of cattle when his horses and burros were taken in 1952. At the date of the last hearing in 1957, he had 160 head of sheep and goats and 39 head of cattle. The dollar value of the difference at $15.00 per head for the sheep and goats,

and $150.00 per head for the cattle, amounted to $15,900.00. The court found "that approximately fifty percent of this amount represents damages to the plaintiff proximately caused by deprivation of the use of plaintiff's horses, and on this basis plaintiff is entitled to recover $7,950.00 as consequential damages resulting from such deprivation". The result, insofar as it related to use damages, was arbitrary, pure speculation, and clearly erroneous. In United States v. Huff, 5 Cir., 175 F.2d 678, a case where the method of computing damages for loss of sheep and goats was strikingly similar to that used here, the court said:

> "Moreover, there has been no sufficient showing of how much of the damage from the loss of the sheep and goats was proximately caused by the Government's failure to maintain and repair the fences under the lease, and how much of the damage resulted from the various other causes. There is no testimony whatever as to the specific dates of loss of any of the sheep and goats, or as to their age, weight, condition and fair market value at the time of the alleged losses. It therefore becomes patent that the evidence as to the loss of these animals in each case fails to rise above mere speculation and guess." (175 F.2d 680)[4]

Plaintiffs' evidence indicated that the loss of their animals made it difficult and burdensome for them to obtain and transport needed water, wood, food, and game, and curtailed their travel for medical care and to tribal council meetings and ceremonies. Plaintiffs also testified that because of the loss of their animals they were not able to

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[4] In Graham v. Street, 2 Utah 2d 144, 270 P.2d 456, the Supreme Court of Utah said:

"The rule is stated in 4 Sutherland, Damages, 4 Ed., Sec. 1175, as follows: 'Only such damages are recoverable as are shown with reasonable certainty to have been sustained. Remote, contingent and conjectural losses will not be considered.' * * *" (270 P.2d 459)

grow crops and gardens as extensively as before. These were factors upon which damages for loss of use could have been based. This does not exclude the right to damages for loss of profits which may have resulted from reduction of the number of livestock, or actual loss of the animals, if the unlawful acts of the defendant agents were the proximate cause of the loss and were proved to a reasonable degree of certainty. United States v. Griffith, Gornall & Carman, Inc., 10 Cir., 210 F.2d 11; Telluride Power Co. v. Williams, 10 Cir., 172 F.2d 673; Orient Min. Co. v. Freckleton, 27 Utah 125, 74 Pac. 652. But the right to such damages does not extend forever, and it is limited to the time in which a prudent person would replace the destroyed horses and burros. The law requires only that the United States make full reparation for the pecuniary loss which their agents inflicted.

The District Court awarded each plaintiff the sum of $3,500.00 for mental pain and suffering. There is no evidence that any plaintiff was physically injured when his horses and burros were taken. There was evidence that because of the seizure of their animals and the continued activity of government agents and white ranchers to rid the public range of trespassers, the plaintiffs and their families were frightened, and after the animals were taken, they were "sick at heart, their dignity suffered, and some of them cried". There was considerable evidence that some of the plaintiffs mourned the loss of their animals for a long period of time. We think it quite clear that the sum given each plaintiff was wholly conjectural and picked out of thin air. The District Court seemed to think that because the horses and burros played such an important part in the Indians' lives, the grief and hardships were the same as to each. The equal award to each plaintiff was based upon the grounds that it was not possible to separately evaluate the mental pain and suffer-

ing as to each individual, and that it was a community loss and a community sorrow.[5]

Apparently the court found a total amount which should be awarded to all plaintiffs for pain and suffering, and divided it equally among them. There was no more justification for such division than there would have been in using the total value of the seized animals and dividing it equally among the plaintiffs. Pain and suffering is a personal and individual matter, not a common injury, and must be so treated. While damages for mental pain and suffering, where there has been no physical injury, are allowed only in extreme cases, they may be awarded in some circumstances. Restatement of the Law of Torts, §§ 46, 47; State v. Baltimore Transit Co., 197 Md. 528, 80 A.2d 13, 28 A.L.R.2d 1062, and the cases collected at 28 A.L.R.2d 1070, et seq. See also Lambert v. Sine, 123 Utah 145, 256 P.2d 241. Any award for mental pain and suffering in this case must result from the wrongful taking of plaintiffs' animals by agents of the United States, and nothing else.

As the case must be remanded for a new trial as to damages, we are confronted with the contention of the United States that it cannot obtain a fair and impartial trial before the same Judge because of his personal

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[5] The court's finding on this subject is as follows:

"28. It is not possible for the extent of the mental pain and suffering to be separately evaluated as to each individual plaintiff. It is evident that each and all of the plaintiffs sustained mental pain and suffering. Nor is it possible to say that the plaintiffs who lost one or two horses sustained less mental pain and suffering than plaintiffs who lost a dozen horses. The mental pain and suffering sustained was a thing common to all the plaintiffs. It was a community loss and a community sorrow shared by all. On this basis, the Court finds and awards the sum of $3,500.00 to each of the plaintiffs as a fair and reasonable approximation of the mental pain and suffering sustained by each, as a proximate result of the taking of the horses by the defendant."

feelings in the matter. In our former opinion we had occasion to make some observations concerning the conduct of the trial. The Supreme Court referred to these observations on the bias and prejudice of the presiding Judge, and said that the trial was not so improperly conducted as to vitiate the findings. This statement did not relate to any of the findings as to damages which are under consideration here. A casual reading of the two records leaves no room for doubt that the District Judge was incensed and embittered, perhaps understandably so, by the general treatment over a period of years of the plaintiffs and other Indians in southeastern Utah by the government agents and white ranchers in their attempt to force the Indians on to established reservations. This was climaxed by the range clearance program, with instances of brutal handling and slaughter of their livestock, which the Court, during trial, referred to as "horrible", "monstrous", "atrocious", "cruel", "cold-blooded depredation", and "without a sense of decency". The Court firmly believed that the Indians were being wrongfully driven from their ancestral homes, and suggested Presidential and Congressional investigations to determine their aboriginal rights. He threatened to conduct such an investigation himself. A public appeal on behalf of the plaintiffs was made for funds and supplies to be cleared through the Judge's chambers. From his obvious interest in the case, illustrated by conduct and statements made throughout the trial, which need not be detailed further, we are certain that the feeling of the presiding Judge is such that, upon retrial, he cannot give the calm, impartial consideration which is necessary for

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*The allowance of $395.00 per head for the Indian horses and burros, and $3,500.00 for mental pain and suffering for their loss, is of itself an indication of the desire of the presiding Judge to assist the plaintiffs for the different wrongs which they had suffered.

a fair disposition of this unfortunate matter, and he should step aside.

Plaintiffs' claims are asserted under the Federal Torts Claims Act. In applying this Act, everyone should be treated the same. Racial differences merit no concern. Feelings of charity or ideological sympathy for the Indians must be put to one side. The deep concern which the executive and legislative branches of the government should have for the plaintiffs does not justify the court in giving them any better or worse treatment than would be given to anyone else. As Justice Jackson said in his concurring opinion in Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 355: "The Indian problem is essentially a sociological problem, not a legal one. We can make only a pretense of adjudication of such claims, and that only by indulging the most unrealistic and fictional assumptions."

Somewhat in analogy to the procedure outlined in Cooke v. United States, 267 U.S. 517, and Offutt v. United States, 348 U.S. 11, we suggest that when the case is remanded to the District Court, the Judge who entered the judgment take appropriate preliminary steps to the end that further proceedings in the case be had before another Judge. See LaBuy v. Howes Leather Co., 352 U.S. 249, 259.

REVERSED, and remanded for a new trial as to damages only.

APPENDIX B

JUDGMENT BELOW

Thirty-Fifth Day, May Term, Friday, July 11th, 1958.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable Alfred P. Murrah, Honorable John C. Pickett, Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Utah and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court for a new trial as to damages only.

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No. 420

In the Supreme Court of the United States

OCTOBER TERM, 1958

BILL HATAHLEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

PERRY W. MORTON,
Assistant Attorney General,

ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys,
Department of Justice,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 420

BILL HATAHLEY, ET AL., PETITIONERS

v.

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A1-A11) is reported at 257 F. 2d 920. The District Court did not write an opinion.[1] Its findings of fact and conclusions of law are set out at 2R. 41-72.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1958 (Pet. App. A12). The petition for a writ of certiorari was filed on October 6, 1958. The

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[1] The oral remarks of the District Court on the occasion of the earlier and lesser award of $100,000 appear in the record in No. 231, Oct. Term, 1955, beginning at p. 413. For consistency with the petition filed in the present proceeding, references to that record will hereafter be designated "(1R.)." References to the record in the instant case will be designated "(2R.)".

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Following this Court's remand of this case to the District Court for appropriate findings on the question of damages (351 U.S. 173, 182), the District Court construed this Court's mandate as an affirmance of the $100,000 award previously rendered and, after a hearing, awarded petitioners an additional $86,017.50, so that the total award was $186,017.50. The Court of Appeals, sitting *en banc*, unanimously reversed. The questions presented are:

1. Whether the District Court erroneously construed the prior mandate of this Court as an affirmance of the prior award of $100,000.

2. Whether the Court of Appeals correctly set aside the award of damages because of errors in the exclusion of pertinent evidence, lack of support in the record for the award made, and want of a fair and impartial determination of petitioners' damages.

3. Whether it was error for the Court of Appeals to suggest that further proceedings in this case be had before another judge.

STATEMENT

On the first occasion when this case was before this Court it was remanded to make findings of damages "with sufficient particularity so that they may be reviewed." *Hatahley* v. *United States*, 351 U.S. 173, 182. A more detailed statement of facts appears in the brief for the United States as respondent in the earlier case

(No. 231, Oct. Term, 1955), but for the present purpose it is believed that the following summary will suffice:

The petitioners, Navajo Indians, instituted this action on March 20, 1953, under the Federal Tort Claims Act, 28 U.S.C. 1346(b), to recover $100,000 as damages for the loss of 116 horses and 38 burros which they owned and which were taken from the federal range in Utah and killed or sold by agents of the Bureau of Land Management (1R. 5-7, 280). The complaint alleged that the taking was willful, unlawful and part of a government plan, in collaboration with white livestock licensees, to drive the petitioners from their ancestral home (1R. 6-7).

After a trial which the Court of Appeals characterized as being "tried in an atmosphere of maximum emotion and a minimum of judicial impartiality" (*United States* v. *Hatahley*, 220 F. 2d 666, 670 (C.A. 10)), the District Court awarded plaintiffs the full $100,000 sought by their complaint. While noting, on appeal, that "the amount of the judgment appears to be more for punishment because of the methods used in eliminating the animals, rather than for the damages suffered," the Court of Appeals did not discuss the question of damages further since it held that there was no liability on the part of the United States. *Ibid.* Following a grant of certiorari, this Court reversed the Court of Appeals on the question of liability and remanded the case to the District Court. This Court held that the conduct of the first trial proceedings was not so improper as to vitiate the findings (351 U.S. at p. 177, fn. 3) and that, on the record, the petitioners were entitled to a judgment for damages which must be appor-

tioned among them. The single paragraph in the opinion of this Court dealing with the matter of damages reads (351 U.S. at p. 182; R. 21):

> The District Court awarded damages in the lump sum of $100,000, the amount sought by petitioners jointly. Apparently this award was based on the value of the horses, consequential damages for deprivation of use and for "mental pain and suffering." Under the Federal Tort Claims Act, damages are determined by the law of the State where the tortious act was committed, 28 U.S.C. 1346(b), subject to the limitations that the United States shall not be liable for "interest prior to judgment or for punitive damages," 28 U.S.C. 2674. But it is necessary in any case that the findings of damages be made with sufficient particularity so that they may be reviewed Here the District Court merely awarded the amount prayed for in the complaint. There was no attempt to allot any particular sum to any of the 30 plaintiffs, who owned varying numbers of horses and burros. There can be no apportionment of the award among the petitioners unless it be assumed that the horses were valued equally, the burros equally, and some assumption is made as to the consequential damages and pain and suffering of each petitioner. These assumptions cannot be made in the absence of pertinent findings, and the findings here are totally inadequate for review. The case must be remanded to the District Court for the appropriate findings in this regard.[2]

[2] The Government had contended (Br. 57-63) that, for several reasons, the award of damages was excessive.

On remand, the District Court accepted the argument of the petitioners that, in the above-quoted paragraph, this Court had affirmed the $100,000 award as representing the value of the horses and burros and merely directed additional findings as to the distribution among the plaintiffs of this sum. The District Court repeatedly stated that it was of this view (2R. 334-335, 370, 424). Nevertheless, sitting without a jury, the District Court took extensive further testimony which it limited to the matter of consequential damages. It subsequently entered findings of fact and conclusions of law (2R. 41-72). The findings were lengthy (70 in number) and the total damages found by the District Court aggregated $186,017.50 (2R. 72, 73), an amount nearly double the earlier award. An appeal by the United States followed.

Following oral argument before a three-judge panel of the court, the Court of Appeals *sua sponte* ordered a rehearing *en banc*. Thereafter, that court unanimously reversed (Pet. App. A1-A11), holding that the District Court erroneously rejected pertinent evidence, that there was lack of support in the evidence for the damages awarded and that there had not been a fair and impartial determination of petitioners' damages. With respect to the Government's request that retrial should be before a different judge, the court wrote: "From his obvious interest in the case, illustrated by conduct and statements made throughout the trial, which need not be detailed further, we are certain that the feeling of the presiding Judge is such that, upon retrial, he cannot give the calm, impartial consideration which is necessary for a fair disposition of this unfortunate matter, and he should step aside" (Pet. App.

A10-A11). Accordingly, the opinion concludes (Pet. App. A11): "Somewhat in analogy to the procedure outlined in Cook v. United States, 267 U.S. 517, and Offutt v. United States, 348 U.S. 11, we suggest that when the case is remanded to the District Court, the Judge who entered the judgment take appropriate preliminary steps to the end that further proceedings in the case be had before another Judge. See LaBuy v. Howes Leather Co., 352 U.S. 249, 259."

ARGUMENT

In view of this Court's ruling in *Hatahley* v. *United States*, 351 U.S. 173, it is settled that the Government is liable for damages in this case. The Government, although liable, is, of course, entitled to have the damages determined in a fair and impartial manner. That this has not yet been done is the unanimous finding of the Court of Appeals sitting *en banc*. At this stage, the matter has merely been remanded to the District Court for a reassessment of damages, and the case now presents no issue calling for review by this Court.

1. The District Court's construction of this Court's decision as an affirmance of the award of $100,000 (2R. 334-335) was clearly erroneous. Rather than reviewing and affirming the prior award, this Court expressly noted that "the findings here are totally inadequate for review" and, accordingly, remanded the case to the District Court for "appropriate findings in this regard" (351 U.S. at p. 182; 2R. 21). Thus there was no basis for the District Court to proceed, as it did, on the assumption that this Court had affirmed the $100,000 award (which the Government urged then and still contends to be excessive). Moreover, even if, as petitioners had contended, this Court had merely directed an ap-

portionment of the $100,000 among the individuals damaged, the action of the District Court was clearly inconsistent in accepting that premise and then proceeding, without amendment of the complaint (Pet. App. A3), to award a sum nearly double the amount sought by petitioners.

2. Entirely apart from the question of construing this Court's prior mandate, the Court of Appeals correctly set aside the District Court's award of damages because pertinent evidence was excluded and because the award lacked support in the evidence and reflected an unfair and partial adjudication of petitioners' damages.

(a). In the words of the Court of Appeals, "The [district] court rejected evidence of the availability of like animals in the immediate vicinity, and their value. This, we think, was error" (Pet. App. A5). This finding of error is abundantly supported by the record. The petitioners' case as to consequential damages was largely built upon their claimed great need for horses in almost every aspect of their lives (*e.g.*, to obtain water, to gather wood and pine nuts, to till their gardens, and to attend ceremonials) coupled with their assertion that these animals were unique (2R. 78, 79-80, 100-101, 118, 134-135, 139-140, 158-159, 166-167, 170, 171-172, 206-207, 227-228, 250-251, 263-264) (Pet. 10, 12). The Government's efforts to show that there were ample horses from the local area available to the petitioners at modest cost—or for the taking (there was such a surplus of horses on the adjacent Indian Reservation that the Indian Agency had a horse elimination program)—were repeatedly blocked by the District Court (2R. 162, 167-168, 202, 330-335, 369-375, 396-397, 399, 409-411, 445-447, 455-457).

In this connection it should be noted that, contrary to the impression sought to be created by the petitioners (Pet. 11, 20), the rejected evidence related to horses from the immediate locality and not to horses unused to local conditions. (See particularly 2R. 331-334, 371-373, 396-397.) Indeed, the assertion was expressly made on behalf of the Government that "these are pictures of horses which were similar, the same type of horse that was picked up in 1952" (2R. 334). Although the evidence was excluded despite the explanation by government counsel that it had reference to horses from the local range which were available to the Indians if they needed horses (2R. 330-335, 445-447; see also 2R. 399, 409-410, 455-457; cf. 2R. 385-387), the court admitted in evidence, over the objections of the Government, photographs of dubious relevance offered by petitioners (2R. 385-387, 427-441).

It should also be noted that the rejection of such pertinent evidence was particularly harmful since part of the great value claimed by the petitioners for their horses was based on the "unique" characteristics of local horses, such as their ability to forage for themselves on the sparse feed of the area. The petitioners had claimed that it would be necessary to breed new horses and train them over a long period of time to become acclimated to the area, and petitioners presented an extravagant computation of the costs of so doing. See Findings of Fact Nos. 3, 4, 21, 24 (2R. 42-43, 49-51). The ready availability of like horses was therefore a crucial aspect of the question of damages.

(b). The Court of Appeals has expressly held that the District Court "applied an erroneous rule, wholly unsupported by the evidence, in arriving at the amount

of loss of use damage" (Pet. App. A6). The details set forth in the opinion of the court below suffice to justify the unanimous conclusion of the Court of Appeals that "We think it quite clear that the sum given each plaintiff was wholly conjectural and picked out of thin air" (Pet. App. A8).

And, while elements of damages need not be proved "to a mathematical certainty" (Pet. 22), it is essential that the loss be shown to be proximately caused by the tortious acts upon which the claim is based. Proof "to a reasonable degree of certainty" is required (Pet. App. A8, citing authorities). Under the Federal Tort Claims Act, damages are determined by the law of the State where the tortious act was committed (28 U.S.C. 1346 (b)) and, as noted by the Court of Appeals (Pet. App. A7, fn. 4), the Supreme Court of Utah has said (*Graham* v. *Street*, 2 Utah 2d 144, 149, 270 P.2d 456, 459):

> * * * The rule is stated in 4 Sutherland, Damages, 4 Ed., Sec. 1175, as follows: "Only such damages are recoverable as are shown with reasonable certainty to have been sustained. Remote, contingent and conjectural losses will not be considered."

(c). The District Court committed other errors of law which not only resulted in an overstatement of petitioners' damages but reflected a lack of impartiality on the part of the trial judge. For example, although permitting the petitioners to develop the major portion of their evidence through leading and unusually suggestive questions (*e.g.*, 2R 93, 100, 109, 110, 117, 119, 130-132, 162, 180, 215, 227, 229, 234, 240, 245-246, 247, 250, 263, 268, 276, 284), the Government's right of cross-

examination was severely limited (*e.g.*, 2R. 82-83, 152-154, 167-168, 173, 248, 253, 254, 260-261, 269, 289).

Even when some of the petitioners' own testimony completely corroborated the testimony of government witnesses, the District Court accepted fully the testimony of other petitioners which was more favorable to their cause. For example, the petitioners emphasized their claim that the loss of their horses prevented them from continuing to till their gardens and gather pine nuts as was their custom (*e.g.*, 2R. 137-138, 143, 149-150, 158-159, 166, 171, 207-208, 222, 227-228, 241, 246, 250, 264, 286; see Findings of Fact Nos. 18, 19, 34, 36 (2R. 48-49, 54-56)). However, some of the petitioners acknowledged that their failure to plant gardens and gather pine nuts in recent years was because lack of rain had made gardening unsuccessful in that area and no good pine nut crops had grown in some years. Thus, petitioner Widow Sleepy acknowledged that it had been some five years since she picked up the last pinons (pine nuts) and she went on expressly to testify: "I think it is due to the drought, too, that there is no pinon crop anywhere" (2R. 113-114, see also 2R. 161, 214). Testimony of other petitioners is to the same effect (2R. 147, 157, 267-268, 287-288). In other words these petitioners testified that it was the drought, not lack of horses, which was primarily responsible for their difficulties. Certain government testimony to this effect was allowed (2R. 322-323, 327) but objection was sustained to other government testimony in this respect on the ground that it was "immaterial and ambiguous" (2R. 402). Cf. Finding of Fact No. 32 (2R. 53).[3]

[3] Other evidence supported the Government's claim that it was really a lack of water rather than a lack of horses which adversely

Membership in a family unit, or even being a neighbor, was in the court's view sufficient to allow one member of the group to speak for all when it involved evidence for the petitioners (*e.g.*, 2R. 77, 96, 118-119, 150-151, 164, 176, 179-180), but it was "immaterial" when the Government's case was involved (2R. 317-318).

In short, as these examples indicate, the conduct of the trial was such that an impartial determination of the actual damages sustained by petitioners was not obtained.

3. Having found error to have been committed, the Court of Appeals suggested that retrial be conducted by a different federal judge. This action, we submit, does not warrant review by this Court. Certainly there is no right to trial by a particular judge, no matter how favorably disposed he may be. When circumstances require, the federal appellate courts have power to direct further proceedings to be conducted by a judge who can consider the matter impartially. *Cooke* v. *United States*, 267 U.S. 517; *Offutt* v. *United States*, 348 U.S. 11; *Calvaresi* v. *United States*, 348 U.S. 961. Facts justifying, if not compelling, exercise of that power are, as we have shown *supra*, plainly present here. This Court, in holding that the conduct of the first trial was not so improper as to vitiate the express findings, did not approve that conduct as related to the award of damages upon which inadequate findings had been made. Moreover, this Court, of course, did not have before it the record of the second trial in which it became

affected the operation of family gardens. It developed that some of the petitioners and other Indians were, at the time of trial and for some time prior thereto, operating gardens some miles away from their usual residences in a place known as Cross Canyon where there was an artesian well (*e.g.*, 2R. 281, 312, 314 (cf. 285-286), 315-316 (cf. 222, 228), 364-365).

even more evident that the trial judge's extreme sympathy for petitioners marred his objectivity. And the Court of Appeals' *en banc* conclusion that the matter should be referred to a new judge was based on its finding that "A casual reading of the two *records* leaves no room for doubt that the District Judge was incensed and embittered * * *" (emphasis added) (Pet. App. A10).

It was in the light of many instances of partiality, some of which we have referred to *supra* at pp. 7-11, that the full Court of Appeals concluded that the trial judge "cannot give the calm, impartial consideration which is necessary for a fair disposition of this unfortunate matter, and he should step aside"[4] (Pet. App. A10-A11).

Petitioners suggest (Pet. 18, 25) that the Court of Appeals was prejudiced against petitioners, as reflected in its "earlier holding that they were entitled to nothing." There is no justification for such a charge. We note, in passing, that a majority of the members of the court in the present case had not participated in the earlier case.[5] Thus, in 1955, Circuit Judges Alfred P. Murrah and John C. Pickett and District Judge (now

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[4] The petitioners' contention that the court below acted simply "on the basis of the matters set forth in its opinion" (Pet. 18) is erroneous, as is made clear by the Court of Appeals itself. Thus, that court demonstrated that its determination of this case was based upon the record by explicitly pointing out that the "obvious interest" of the trial judge is "illustrated by conduct and statements made throughout the trial, which need not be detailed further. * * *" (Pet. App. A10).

[5] The want of impartiality on the part of the trial judge found by the Court of Appeals came not simply by virtue of the fact that he had sat in the earlier case but because of numerous instances of partiality clearly appearing in the records of both trials.

Chief Judge) Royce H. Savage heard the case. Sitting *en banc* in the present case were Chief Judge Sam G. Bratton and Circuit Judges Alfred P. Murrah, John C. Pickett, David T. Lewis and Jean S. Breitenstein.

Further, the earlier award of $100,000 was sufficient to cause this Court expressly to note that the United States is not liable for punitive damages (351 U.S. at p. 182; 2R. 21). It is submitted that the trial record, and even the petition itself, demonstrates that petitioners still seek and were awarded by the District Court punitive damages to which they are not entitled.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys.

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